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Carrier's claim of faulty hangar design ruled out of time

Cargojet Airways Ltd ("Cargojet") is a commercial air cargo carrier with its main base of operations at the John C. Munro Hamilton International Airport in Hamilton, Ontario. In 2008, Cargojet hired Aveiro Constructors Limited ("Aveiro") to design and construct a hangar at the airport. It also hired Hatch Mott MacDonald Ltd/Hatch Mott MacDonald Ltee ("Hatch") as its consultant engineer to ensure technical compliance and for construction administration.

The hangar required a fire protection system. Aveiro originally proposed a "foam deluge system", specifically designed for high hazard areas, such as those in which a severe fuel hazard was present. This sort of system is common in airplane hangars and other facilities that may contain highly combustible materials. The "foam deluge system" requires a connection to a water line and in this instance a $500,000 fee would have applied to connect to the airport's water system.

After consulting with Aveiro, Hatch and the Hamilton airport's own consultant, Cargojet selected a spray-in-place system comprised of a semi-rigid layer of fire retardant and a sprayed layer of fibrous insulation for additional retardant value. This "insulation" was sprayed on the underside of the hangar's roof and this work was completed in April 2009.

The construction of Cargojet's new hangar was substantially completed in May 2009. Over the course of several years, commencing in 2009, portions of the hangar's insulation fell off of the underside of the ceiling and had to be re-applied on numerous occasions.

Eventually, Cargojet commenced an action against Aveiro and Hatch on October 11, 2013. In May of 2016, the Ontario Superior Court of Justice held that Cargojet's claims against both defendants should be dismissed on a summary judgment motion because they were brought out of time.

Cargojet's contract with Aveiro included a provision whereby Aveiro agreed to be fully responsible to Cargojet for acts and omissions of subcontractors. In addition, Aveiro agreed to "promptly remove" and "replace or re-execute" any defective work that had been rejected by Hatch, the consultant.

Under its contract with Cargojet, Hatch was required to review design plans and specifications, answer any technical questions, evaluate proposed changes and ensure construction compliance by Aveiro. The contract also included a limitation period that meant that any action had to be commenced by Cargojet against Hatch within one year "after the year of performance of the Services hereunder."

There was no contractual limitation period under Aveiro's contract, meaning that the standard two-year limitation period under the *Limitations Act, 2002* applied.

As early as April 13, 2009 - shortly after they had been applied - Cargojet employees noticed that the insulation and fire spray were flaking off from the ceiling. In May 2009, a section of the insulation/fire spray measuring six feet by six feet fell from the ceiling. These problems were reported to Aveiro by Cargojet and Hatch. Aveiro's subcontractor re-sprayed the ceiling at no cost to Cargojet.

But the problem continued through the summer of 2009. In her reasons, Justice Braid set out in detail a timeline of communications, both written and oral, regarding the falling insulation. Some of these were communications between parties, whether Cargojet and the consultant, contractor and/or subcontractor, while others were internal communications between Cargojet employees.

It appeared that the insulation would come free each spring and continue to fall over the course of the summer months. The problem appeared to cease in October or November and then re-appear each April or May.

The evidence shows that the parties were attempting to understand the root causes of the continued problem. This is important to the question of whether or not Cargojet commenced its legal action in time. In general, and somewhat simplified, a limitation period under the *Limitations Act, 2002* does not begin to run until the plaintiff knows that it has suffered a loss and that the loss was caused by the act or omission of another party. This concept of "discoverability" does not require certainty of knowledge and it is not a subjective test. If a reasonable person in the circumstances of the plaintiff ought to have known that a legal action could be pursued as of a certain date, it is on that date that the plaintiff's limitation period begins to run.

There was evidence that as early as 2009 Hatch told a key Cargojet employee that legal action against Aveiro should be considered if the insulation deficiency was not remedied properly. Unlike much of the evidence referred to by the judge, this was not contained in an email or memorandum, but reported by a Hatch employee on cross-examination. That is, the Hatch employee reported that he told a Cargojet employee to consider legal action orally in or about 2009. Perhaps crucially, Cargojet failed to counter this evidence directly; in particular, the Cargojet employee in question did not give any evidence at all.

Some of the possible causes of the problems included temperature, including fluctuations in temperature, ventilation issues,

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a leak in the roof, bird nests, improper installation, weight of the insulation, high winds and humidity issues, among others.

On the motion, Cargojet argued that it had not incurred a loss until April 2013. It was then that Aveiro wrote to Cargojet to set out what it believed were the factors contributing to the problem. Aveiro estimated it would cost Cargojet more than $400,000 to fix the problem. Until this point, the fire retardant and insulation had been re-sprayed at no cost to Cargojet.

In addition, Cargojet argued that it did not know that the fire protection system had been negligently designed until June 2013 when, according to Cargojet, an employee of the subcontractor that had installed the insulation said that the problem was a predictable result because the metal roof was exposed to the elements and subject to temperature variations and condensation. The subcontractor specifically denied that he gave this opinion to Cargojet.

If either of these arguments had been accepted, Cargojet's October 2013 claim against Aveiro would not have been out of time.

Justice Braid held that Cargojet's claim was not discovered in June 2013. While she noted that the subcontractor denied having given the opinion on which Cargojet's theory is based, she held that even if that opinion had been given, Cargojet's claim was discoverable long before June 2013. As Justice Braid noted,

> Certainty of a potential defendant's responsibility for an act or omission that caused or contributed to the loss is not required. Nor is it necessary that the plaintiff have knowledge of the precise cause of the loss. The plaintiff need only have *prima facie* grounds to infer the acts or omissions were caused by the identified parties. The limitation period will not be tolled while a plaintiff sits idle and takes no steps to investigate whether it has a claim.

In Justice Braid's view, Cargojet had *prima facie* grounds to investigate a possible claim "much earlier than June of 2013."

Turning to Cargojet's argument that it reasonably assumed that Aveiro would fix the problem at no cost until it received a quote for additional work in April 2013, Justice Braid held,

> Cargojet did nothing to clarify whether this assumption was correct. There was no agreement to suspend the limitation period or to extend the warranty in relation to the insulation issue. Even more importantly, Cargojet knew that the defendants would not keep coming back indefinitely to re-spray and knew that the patching of the insulation was not a permanent solution.

For the limitation period to begin to run, it is not necessary that the plaintiff know the precise extent of its loss. In addition, mere discouragement from commencing an action is not enough to prevent the running of the limitation period. In this respect, Justice Braid distinguished this case from those involving lawyer-client or doctor-patient relationships: in the latter cases, assurances that errors will be fixed are often found to suspend the discoverability date. The repeated re-spraying of the insulation did not delay the running of the limitation period, according to the court.

In Justice Braid's view, Cargojet's limitation period for suing Aveiro commenced on May 3, 2010, the date of an email authored by a key Cargojet employee in which it was recognized that the problem may have been a systemic one and that the subcontractor would not continue to re-spray forever. Over the course of the months following May 3, 2010, Cargojet accumulated additional information that should have indicated that a legal action was appropriate. As a result, its October 2013 action was ruled out of time.

With respect to Hatch, Justice Braid first held that the parties had legitimately varied the statutory limitation period in their contract: the 12 month limitation period was clear and unambiguous, and the contract was obviously a "business agreement" as that term is understood under the legislation, since neither party was a consumer.

The evidence showed that Hatch was actively involved in the hangar project from the commencement of its retainer in 2008 through the "substantial completion" of the construction in May 2009 until the autumn of 2010. This involvement included providing advice to Cargojet in respect of the falling insulation - including, as was noted previously, advising that legal action should be considered - and corresponding with Aveiro about the ongoing problems.

However, for a period of two years commencing in the fall of 2010, Hatch was not involved at all. In September 2012, it did provide advice to Cargojet in respect of the insulation, stating that in its view the problem implicated the design and construction of the hangar. But this did not matter to the limitations analysis because the basis of any claim arose from Hatch's conduct in 2009 and 2010.

In Justice Braid's view, on a strict reading of the contractual limitation period, Cargojet should have commenced any action against Hatch by no later than the autumn of 2011, one year following the completion of its work in 2010.

This case shows the importance of staying conscious of limitation periods, even while attempting to find amicable solutions to problems that arise.

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